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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-898

CHARLES LAURENT FIOCCONI
and JEAN CLAUDE KELLA,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1972

No.

CHARLES LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Comes now Raymond Bernhard Grunewald, attorney for the petitioners, and hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case, entered November 28, 1972.

Opinions Below

No formal written opinion was filed by the District Court. The Court of Appeals affirmed petitioners' conviction without opinion but noted, orally, in essence, that the petitioners' already have a petition pending before this Court which could be dispositive of the main issues.

Jurisdiction

The judgment of the panel of the Court of Appeals was entered on November 28, 1972. This petition is filed within thirty (30) days of the date of entry of judgment of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATUTE

§ 174, Title 21, United States Code:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . .

* * * * *

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

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Questions Presented

1. Whether persons, having been formally extradited from a foreign country at the request of the government of the United States:

(1) where the extradition was based on a specific single charge indictment and evidence relating only to proof of that single charge, and

(2) where the foreign sending state specifically directed the extradition of the persons concerned to stand trial on the specific charge as stated in the indictment of a specific federal district, the District of Massachusetts,

while awaiting trial on this charge, may lawfully be subsequently subpoenaed to another federal district, arrested there pursuant to another indictment, and be tried and convicted of separate and distinct charges relating to events which occurred prior to their extradition?

2. Whether the opinion and doctrine set forth by this Court in *United States* v. *Rauscher*, 119 U.S. 407 (1886) is still the law of the land?

3. Whether there was sufficient evidence to establish, beyond a reasonable doubt, petitioners' guilt of the crimes charged?

(a) Absent any proof of a defendant's commission of the substantive crimes charged, and where the only evidence possibly linking him with the conspiracy charged occurred some five (5) days after the substantive crimes occurred, can he stand convicted even under the doctrine espoused in *Pinkerton* v. *United States*, 328 U.S. 640 (1946)?

(b) Can a defendant be convicted of violating § 174, Title 21, U.S.C., absent proof of knowledge of illegal

importation or that "possession" from which a statutory inference could flow?

(c) Is hearsay proof of original ownership of a prohibited drug in Europe sufficient to establish the inference created by § 174, Title 21, U.S.C.?

4. Whether the trial court committed reversible error in its charge as to proof of aiding and abetting constituting sufficient proof to convict even absent the possession from which the inference flowed as provided in § 174, Title 21, U.S.C?

5. Whether physical evidence of narcotics and testimony leading to its introduction and testimony as to supposed suspicious behavior, all subsequently stricken and testimony as to importations made by others long after petitioner's incarceration, coupled with trial court's refusal to take judicial notice of the uncontroverted fact of petitioners' continuing and lengthy incarceration, did not unfairly prejudice petitioners' right to a fair trial?

Statement of Facts

With respect to the essential facts preceding the trial itself and pertinent to the arguments on the subject matter of extradition, such have been fully set forth in the petition and joint appendix filed under docket number 72-332, and the same are hereby incorporated by reference, as though fully set forth herein, to avoid unnecessary duplication.

The application for a Writ of Habeas Corpus was renewed at the trial itself. (R. 641; R. 661)[1] Petitioners had also timely moved for dismissal on the grounds of the trial court's lack of jurisdiction. (R. 640-641; R. 661)

[1] Reference Key: R.—trial record.

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At the trial the government called some 30 witnesses. Of these, only one, Richard Berdin, testified to knowledge with respect to shipments of heroin into the United States and statements allegedly made by other persons in furtherance of doing so. No alleged shipment was ever intercepted. Only one other witness, Cleo Bennett, testified as to having known the petitioners and that they were acquainted with other alleged conspirators. She stated that she had been petitioner Kella's girlfriend from October 1969 until about August 6, 1970. The substance of her testimony was only that Kella *knew* a Guido Randall, a "Louie", Jean Dumerain, petitioner Fiocconi, Francis Vanderberghe, Joseph Signoli and Andre Andreani. (R. 347-R. 389) She did not testify as to any criminal act on the part of either petitioner. Two witnesses were government chemists and the balance were witnesses with respect to chains of custody as to several cars.

Richard Berdin testified as to his part in a scheme to import large quantities of heroin into the United States during the period April 1970 through February 1971. (R. 35-R. 284; R. 662) The scheme involved secreting plastic bags, containing heroin, in various automobiles. Co-conspirators named Scapula, Signoli and Salles recruited him to bring the heroin to one Andre Labay, a courier recruited by Berdin, who in turn would smuggle it into the United States at a fee of $1,000 per kilo. (R. 42-R. 51) Once in New York, the heroin was returned to Berdin (R. 84-R. 85; R. 106-R. 110), who then returned it to one Jean Dumerain (R. 90), an agent of Signoli, or to Signoli himself. (R. 112) The $1,000 per kilo was paid to Berdin by the person receiving the heroin from him, either Dumerain (R.91) or Signoli (R. 114; R. 129-131) and Berdin then later shared this

fund with Labay. (R. 92-93; R. 114) Berdin later received an additional sum for his share in the conspiracy. (R. 139)

Berdin testified that he had met petitioner Fiocconi in Paris in April of 1970 in the company of Scapula, Signoli and Salles (R. 58-R. 60) and had later accidentally met him in May, 1970 also in Paris. (R. 67-R. 68) He testified to a third meeting in a car in Paris (R. 68-R. 68-69; R. 71) Berdin attempted to link Fiocconi to the conspiracy by testifying to statements of Signoli, indicating that the smuggled heroin was originally owned by Fiocconi and had been loaned to Scapula, Signoli and Salles by Fiocconi. (R. 78) There was no testimony that Fiocconi admitted ownership of the heroin to Berdin, or anyone else.

In every conversation Berdin said he had with other persons, many names were mentioned as people involved with heroin trafficking. Berdin's main associates were Scapula, Signoli, Salles and Labay. (R. 37-R. 61) In the United States he dealt with one Dumerain. (R. 63-R. 67; R. 257-R. 258) Kella's name was not mentioned.

On May 31, 1970, 4 to 5 days *after* the 37 kilos of heroin hidden in the first of three cars, a Bentley, had arrived and a few days after it had been turned over to Dumerain by Berdin, Berdin for the first and only time met petitioner Kella. (R. 82-R. 88; R. 91) Berdin, Kella and Dumerain had dinner at the Pierre Hotel. At dinner Kella advised Berdin on how to behave in New York. Berdin then testified:

> "After I told him that Labay wanted $2,000 a kilo, he say, 'No, we give him the regular price. If he is not happy, throw him away, we don't need him.'" (R. 98)

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Later they spent a social evening at a nightclub on 86th Street in Manhattan. (R. 95-R. 101) Berdin only met Kella on this one occasion and even then did not really know Kella's name. (R. 273)

Berdin testified as to additional shipments brought in by Labay in a Lancia automobile and in a Mercedes automobile. Evidence, consisting of two kilo bags of heroin recovered from a Lancia on May 11, 1972, after the ownership of the automobile changed hands many times, was in open view of the jury on the Government counsel table throughout the Government's case. The evidence and the witness' testimony as to the two kilos were later stricken by the trial judge. (R. 655) There was no heroin found in any of the other cars other than minute traces of heroin obtained many months after the alleged smuggling by special chemical tests after normal testing failed to indicate the presence of any heroin in any of the three automobiles. (R. 525-R. 551) The ownership of all of the cars in question had changed numerous times between the alleged smuggling and the chemists tests. (R. 406; R. 429; R. 439; R. 449; R. 454; R. 463; R. 481; R. 485; R. 490; R. 493) One of the vehicles in question had even been rigged in the interim by the special effects department of a motion picture studio for use in a motion picture and had in fact been so used. (R. 462-R. 480)

Petitioners did not testify. The Court refused to take judicial notice of uncontested facts and to so advise the jury, *i.e.* that petitioners had remained in police custody from August 6, 1970 until their extradition in October 1971, and subsequent thereto, even though the court had permitted evidence of other heroin importations subse-

quent to the petitioners' arrest and incarceration and to which petitioners were never linked. (R. 147-R. 151; R. 195; R. 659-R. 661)

ARGUMENT

I

Where there is a formal extradition proceeding between nations, whether pursuant to treaty or comity, and the evidence presented in support of the extradition enumerates a specific charge in a stated jurisdiction, and the sending state extradites a person to stand trial on a specific charge in a specific jurisdiction, the person so extradited can be tried only for the specific crime for which he was extradited and only in the specific jurisdiction to which he was extradited.

The arguments and propositions advanced by the petitioners in their previous petition, filed under docket number 72-332, together with the case law and facts cited in support thereof, are repeated and realleged as though fully set forth herein, thereby avoiding lengthy and unnecessary duplication, in support of their challenge to the jurisdiction of the trial court, Southern District of New York.

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ARGUMENT

II

The charge for which petitioners were indicted in the District of Massachusetts is a separate offense from that which is charged in the Southern District of New York. Accordingly, they can not be lawfully tried for a specific crime for which they were not extradited. To do so violates their rights and guarantees under § 3192, Title 18, U.S.C.

The arguments and propositions advanced by petitioner's in their petition filed under docket number 72-332, together with the case law and facts cited in support thereof, are repeated and realleged as though fully set forth herein, thereby avoiding lengthy and unnecessary duplication, in support of their challenge to the jurisdiction of the trial court, Southern District of New York.

As was noted in their petition, docket number 72-332, and appendix C therein, Note Verbale No. 736, dated Rome, December 2, 1971 from the government of the United States of America to the government of the Republic of Italy, there will eventually be a Treaty of Extradition in effect which will *specifically prohibit, in* Article XV, *the trial or punishment of persons extradited for other than those crimes for which extradition was granted.*[2]

Realizing the enormity of the crime for which the petitioners stand convicted, albeit unlawfully, it would seem

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[2] A letter from the Department of State, dated August 15, 1972, refers to the treaty as not in final form. However, it is apparent that although the treaty is not yet available, the extradition portion will contain the "typical modern provision on the rule of speciality" as may be seen in the recently negotiated treaty with Spain. (App. Ex. A; App. Ex. B)

pertinent to recall the historic admonition of *Mr. Justice Brandeis*, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928):

> "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution."

For the above reasons, as spelled out in detail in petition No. 72-332, any detention and deprivation of liberty of the petitioners as a result of their conviction under 72 CR 4, S.D.N.Y. is illegal and void.

ARGUMENT

III

Even when viewed in the light most favorable to the government, there was insufficient evidence to establish, beyond a reasonable doubt, that petitioner Kella was guilty, either as to the substantive crimes charged or as to the conspiracy.

In a trial record of almost 800 pages, testimony crucial as to petitioner Kella is restricted, in essence, to some seven pages. (R. 95-R. 101) Of these seven pages, only three lines of testimony indicate Kella's acquaintance with trafficking. Berdin testified to a piece of conversation at a restaurant:

> "After I told him that Labay wanted $2000 a kilo, he say, 'No, we give him the regular price. If he is

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> not happy, throw him away, we don't need him.' " (R. 98)

Then, in response to a suggestive question by the prosecution (objected to) Berdin also testified:

> "He say, 'You have to realize that it is something very dangerous. That means you can go to jail. That is why you have to be very, very careful about everything you do.' " (R. 99-R. 100)

There was another scrap of conversation, after the 37 kilo delivery had been made, Berdin recalling that Dumerain had told him that "Jean Claude" was very mad at him. (R. 88-R. 89) However, it was later revealed by Berdin that there was another "Jean Claude"—Demeester, who was an active co-conspirator. (R. 130; R. 148-R. 149) The subject of Dumerain's conversation was never positively identified.

In addition to this, as noted previously in the Statement at p. 5, one Cleo Bennett testified that Kella knew certain people. Berdin's testimony involved the same people in Berdin's drug trafficking.

It is elementary that neither association with conspirators nor knowledge of illegal activity constitute proof of participation in a conspiracy. *Roberts* v. *United States*, 416 F.2d 1216, 1220 (5th Cir. 1969). Nor can a person aid or abet in a crime which has already been completed. *Id.* at 1221.

The only evidence before the jury concerned a conversation that an informer said took place days after the substantive crime charged had been completed. It related to another conversation with a third person that the same

informer said took place a day or so after the substantive crime of importation had been completed.[3]

Mindful of the doctrine espoused in *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), and in whose dissent petitioners' concur, it is contended that the distinction drawn in *United States* v. *Cantone*, 426 F.2d 905 (2d Cir. 1970) has particular application here. For, as in *Cantone*, it was not proved that Kella had joined in a conspiracy *before* the conversation took place assuming, *arguendo*, that this conversation joined him to the conspiracy. *Id.* at 904.

Furthermore, as noted in *Causey* v. *United States*, 352 F.2d 203, 207 (5th Cir. 1965):

> ". . . To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof and will not serve in lieu of proof. *Charges of conspiracy are not to be made out by piling inference upon inference. Guilt of conspiracy may not be inferred from mere association.*" [Emphasis supplied]

See also, *United States* v. *Arnone*, 363 F.2d 385, 403 (2d Cir. 1966).

Of particular application here is the doctrine set forth in *United States* v. *Jones*, 308 F.2d 26 (2d Cir. en banc 1962). There is no *evidence* in this case that petitioner

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[3] Berdin arrived in New York around May 25, 1970. One day later he met Labay at the N. Y. Hilton Hotel. A day later Labay showed him the 37 kilos. (Counts 2 and 3) Labay stated he wanted $2000 per kilo in the future. (R. 82-R. 86) Berdin met Dumerain one or two days later on Fifth Ave. A day later he met Dumerain again and a day later Berdin met Kella for the first and *only* time. (R. 91; R. 96)

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Kella knew the origin of the heroin involved. The government relied on the theory that Kella, although concededly never shown to be in possession of the drug, was an aider and abettor of persons who were in possession and the trial court so charged. (R. 748-R. 749) But, as noted previously, as to the substantive charges, one cannot aid and abet in a crime that has been completed. Furthermore, the mere fact of aiding and abetting in the possession of narcotics by others, particularly as to conspiracy, does not give rise to the requisite inference of guilty knowledge. The prosecution cannot rely on the mere fact of a defendant's knowledge that another possessed narcotics for sale, short of possession by the defendant himself, to establish the requisite scienter on the part of a defendant. *United States* v. *Jones*, *Id.* at 32-33. See, *United States* v. *Landry*, 257 F.2d 435 (7th Cir. 1958).

For the reasons stated, petitioner Kella's conviction should be reversed and the indictment dismissed.

ARGUMENT

IV

The evidence, even when viewed in the light most favorable to the government, was insufficient to convict petitioner Fiocconi of the substantive crimes charged or as to the conspiracy.

Berdin's testimony and the hearsay declarations of his co-conspirators, as related by Berdin, clearly show Fiocconi to be a narcotics trafficker in France. But in no way does Berdin's evidence substantiate Fiocconi's participation in either the conspiracy charged or in the substantive crimes

charged relative to the 37 kilo heroin shipment smuggled into the United States on May 25, 1970 in the Bentley automobile.

Berdin testified that he had met with Fiocconi in Paris on only three occasions, the latter two being chance or brief meetings. (R. 59-R.71) Berdin testified that Fiocconi had advised him about the care that must be exercised in the United States, his manner of travel to the United States and inquired into his visa status. (R. 59-60; R. 68) However, at no time was Fiocconi instructed as to the particular 37 kilo shipment which was brought from Marseilles by Scapula and which Berdin delivered to Labay to smuggle to New York. (R. 61-R. 62)

Fiocconi evidenced no interest or dominion in that shipment and it is only the hearsay declarations attributed to Signoli that give any support to the proposition that Fiocconi had any interest in the heroin which Scapula, Signoli and Salles were sending to the United States by way of Berdin. Signoli's hearsay declarations, as reported by Berdin, admit that Fiocconi was not paid for the heroin but rather that he "lend" the drug to Scapula, Signoli and Salles, thus showing non-participation in this venture. (R. 78) This testimony, by the prosecution's witness, if accepted at face value, establishes Fiocconi as the origin of heroin, perhaps its true owner, but not in any way as a co-conspirator.

The necessary evidence required to establish Fiocconi's agreement to or participation in the conspiracy to smuggle the 37 kilos of heroin, or any other shipment, is lacking. See, *United States* v. *Webb*, 359 F.2d 558 (6th Cir. 1966). Fiocconi's mere association with conspirators is insufficient

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to establish conspiracy. *United States* v. *Arnone*, 363 F.2d 385 (2d Cir. 1966); *United States* v. *Webb*, *supra*. Moreover, adding knowledge of the violation of the law to an association with conspirators, is likewise insufficient. *Roberts* v. *United States*, 416 F.2d 1216 (5th Cir. 1969). Clearly, the intention to join a particular conspiracy cannot be lacking from the proof.

As to the substantive crimes and the charges of aiding and abetting in their commission, proof must be established of Fiocconi's participation in and knowledge of the illegal importation into the United States of the particular shipment of drugs or that he was in at least constructive possession, *after importation into the United States*. *United States* v. *Jones*, 308 F.2d 26, 31 (2d Cir. en banc, 1966). However, all testimony relative to Fiocconi ends prior to the importation of *any* of the heroin testified to by Berdin. Moreover, there is no testimony that Fiocconi was ever in the United States so any kind of "possession" necessary for conviction under either the conspiratorial or the substantive counts must be lacking. *United States* v. *Landry*, 257 F.2d 425, 431-432 (7th Cir. 1958).

While possession has been defined as both the power to control the disposition of drugs, as well as actual physical custody, neither has been proven as to Fiocconi. *United States* v. *Jones*, *supra* at 30.

In the case at bar there has been no showing of even constructive possession and the mere knowledge and even approval of narcotics trafficking and traffickers is not enough to establish even this level of possession. *Id.*

What we have here is evidence of possible prior dealings, *in France*, by Fiocconi and the novel idea that Ficconi's

ownership of drugs used by Signoli and Berdin is proof of their possession. As stated in *United States* v. *Landry*, 257 F.2d 425, 431:

> ". . . Assuming, as we think proper, that Congress employed the word 'possession' in its ordinary and usual connotation, it certainly means something different than 'ownership'. Ownership is not proof of possession anymore than possession is proof of ownership. If Congress had intended that a presumption arise against the owner as well as the possessor of a narcotic, it would have so declared. The same can be said of constructive possession or the unexercised right of possession.
>
> * * * * *
>
> ". . . We reject the idea that speculation can be employed as a substitute for proof."

Counts I, II and III, all contain the statutory prerequisite of doing certain things with respect to narcotic drugs, "*after* the said narcotic drugs had been imported . . . into the United States . . . *knowing* that the said narcotic drugs had been imported . . . *into the United States* . . ."

For the reasons set forth above, the conviction as to Fiocconi should be reversed and the indictment dismissed.

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ARGUMENT

V

The trial court committed reversible error in its charge as to aiding and abetting as being sufficient proof to establish petitioners' guilt, under the statute concerned, violating petitioners' rights under the Fifth Amendment to the United States Constitution.

The trial court charged:

> "Under these substantive counts, it will occur to you that there is no direct evidence that either defendant on trial physically handled the heroin following its alleged importation into this district. The government makes no contention that they did. It relies upon another federal law, generally referred to as to the aiding and abetting law, which reads as follows:
>
> 'Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.'
>
> Accordingly, you may find a defendant guilty of the offenses charged if you find beyond a reasonable doubt that another person committed the offense and that a defendant aided and abetted him. In order to find that a defendant aided and abetted another in the importation, receipt, concealment or sale of heroin, you must be satisfied that he in some way knowingly associated himself with the criminal venture in a meaningful manner, that he knowingly participated in it as something he wished to bring about and by some action of his to make it succeed, that he had a stake in its outcome.
>
> In other words, if one fully aware of what he is doing plays a signficant rcle in furthering a trans-

> action prohibited by law, he is an aider and abettor and as such, he is equally guilty with the person who actually commits the crime.
>
> Against that background, and the applicable law to the specific charges, let us turn to the testimony." (R. 748-R. 749)

Counsel for petitioners objected to this portion of the charge, as given, and requested corrective instructions. (R. 766; R. 768)

There was no evidence that either petitioner had possession of narcotics at any time. The prosecution's proof relied on aiding and abetting. But aiding and abetting is *not* enough, albeit the trial court so charged, to find the petitioners guilty of the crimes charged here. *United States* v. *Jones*, 308 F.2d 26, 32-33 (2d Cir. en banc 1962).

In the context of the court's charge, the jury was able to find petitioners guilty on the basis, not by proof as to their independent knowledge, but on the basis of proof as to other defendants' guilty knowledge, or proof flowing from the possession by other defendants with the inferences arising out of that possession imputed to petitioners.

For these reasons petitioner's conviction should be reversed.

ARGUMENT

VI

Cumulative errors in the course of the trial created such prejudice as to deny petitioners a fair trial and, thereby violating their rights under the Fifth Amendment to the United States Constitution.

A. Two Kilos of Heroin.

After a long trail of documentary witnesses, testimony was elicited as to two kilos of heroin found in a Lancia automobile on May 11, 1972. An agent testified at length as to how he found them in the car. (R. 506-R. 518) They were received in evidence over objection. (R. 523) Appropriate motions to strike the evidence and for a mistrial were made at the end of the government's case (R. 630; R. 643; R. 655) The motion to strike was granted but motions for mistrial were denied. (R. 655) A brief instruction to disregard was given to the jury. (R. 656)

B. Testimony of Cleo Bennett.

Cleo Bennett testified about her travels with petitioner Kella. Despite the objections of counsel and the admonition of the Court to the prosecution not to pursue matters immaterial to the trial issues, the prosecution persisted in creating an aura of suspicion as to events not connected to the petitioners, (R. 383-R. 385) and which was, admittedly, based on the hope that the jury's minds could be laden with prejudicial surmise. (R. 649) The defense motion to strike was granted but a mistrial was denied. (R. 642; R. 655)

C. Court's Refusal to Take Judicial Notice of Uncontroverted Dates and Facts.

It is an uncontroverted fact that the petitioners were incarcerated in Italian prisons from August 6, 1970 until October 6, 1971 when they were transferred to custody in the United States where they continued in custody. The trial court had presided over motions directed to petitions for writs of habeas corpus and had written an opinion, filed March 16, 1972, which dealt with these very facts. Certainly there is not a shred of evidence linking petitioners with the testimony of heroin importations made after the conversation attributed to Kella on May 31, 1970. Nevertheless the trial court refused to take judicial notice and Berdin's testimony with respect to this evidence was permitted to stand despite appropriate motions, the defense being relegated to calling the defendants or hostile government agents. (R. 641-R. 644; R. 659-R. 662)

It is submitted that the two packaged kilos of heroin accepted into evidence before the jury, "subject to connection", so contaminated the trial as a whole as to preclude a fair trial. It was vitally and visually corroborative of Berdin's testimony in general. See, *Channel* v. *United States*, 285 F.2d 217 (9th Cir. 1960).

United States v. *Borelli*, 336 F.2d 374 (2d Cir. 1964), cited by the prosecution (R. 650) and whose rationale, as interpreted by the trial court, was the underlying factor in the refusal by the court to let the jury know uncontroverted facts which were the subject of a judicial decision in this Circuit, (R. 660; 131a) left the trial court caught up in the proposition that incarceration is not necessarily proof of an individual's termination of his participation in a conspiracy and thus, its proof could be excluded. That is not

the point. Petitioner's, it is submitted, had a right to have that factor brought to the jury's attention in the light of the evidence elicited at the trial. It was a vital matter for the jury to consider. *United States* v. *Borelli*, *Id.* at 389.

As was noted in *Continental Can Co.* v. *United States*, 272 F.2d 312, 314-315 (2d Cir. 1959), dealing, as in the instant case, with a situation involving undisputed facts:

> "In reaching their decision, neither courts nor administrative bodies should ignore the realities of life and disregard common knowledge even though such knowledge may not have achieved a place within the purview of judicial notice."

When prejudice results from failure to take judicial notice such is grounds for reversal. See, *Blas* v. *Talabera*, 318 F.2d 617, 619 (9th Cir. 1963). A Federal court can take judicial notice of matters of record in its own court as well as courts within its jurisdiction. See, *Comm. of Pa.* v. *Brown*, 373 F.2d 771, 778 (3rd Cir. 1967); *Wallach* v. *Lieberman*, 219 F.Supp. 247, 248 (S.D.N.Y. 1963), *aff'd.*, 366 F.2d 254 (2d Cir. 1966).

It is respectfully submitted that even if no single issue raised in Arguments III through VI, above, would require reversal of the convictions, the fact that they occurred created a total effect that cast such a serious doubt on the fairness of the trial that the convictions must be reversed. *United States* v. *Guglielmini*, 384 F.2d 602 (2d Cir. 1967).

CONCLUSION

For the reasons stated above, petitioners' rights under the Constitution and Laws of the United States, and the Law of Nations, were violated. Their petition for a Writ of Certiorari should be granted so that this Court can consider the important questions of the rights of extradited persons and due process of law.

Respectfully submitted,

RAYMOND BERNHARD GRUNEWALD
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16 Court Street
Brooklyn, New York 11241

GRUNEWALD, TURK & GILLEN
Of Counsel

APPENDIX A

DEPARTMENT OF STATE

Washington, D. C. 20520

August 15, 1972

Mr. Norman Turk
Grunewald, Turk & Gillen
Attorneys at Law
16 Court Street
Brooklyn, New York 11241

Dear Mr. Turk:

I refer to your letter of July 19 with which you requested a copy of the newly negotiated extradition treaty between the United States and Italy and in particular Article XV of that treaty.

Substantial agreement has been reached with the Government of Italy on the text of a new extradition treaty. However, the treaty is not yet in final form and has not been signed, certain provisions remaining under study by the two governments. The treaty terms have not been made public either in the United States or Italy. Until negotiations have been concluded, the text is considered to remain in confidence as between the two governments. If the treaty is signed, we would be prepared to make its text, or Article XV of the treaty, available to you per your request. Although Article XV thus has no legal force and effect at this time—being still a negotiating text—it is anticipated that the treaty once concluded will contain provisions on the

rule of speciality. Our extradition treaty with Spain, copy enclosed, contains a typical modern provision on the rule of speciality (Article XIII).

Sincerely yours,

K. E. MALMBORG
Assistant Legal Adviser for
Management and Consular Affairs

Enclosure:

Treaty with Spain

APPENDIX B

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 7136

EXTRADITION

Treaty Between the
UNITED STATES OF AMERICA
and SPAIN

Signed at Madrid May 29, 1970

[SEAL]

ARTICLE XIII

A person extradited under the present Treaty shall not be detained, tried or punished in the territory of the requesting Party for an offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

2. He has not left the territory of the requesting Party within 45 days after being free to do so; or

3. The requested Party has consented to his detention, trial, punishment or to his extradition to a third State for an offense other than that for which extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

Appendix B

ARTICLE XIV

A Party which receives two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought, taking into consideration the existing circumstances and particularly the posibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the nationality of the person sought, the dates upon which the requests were received and the provisions of any extradition agreements between the requested Party and the other requesting State or States.

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of November, one thousand nine hundred and seventy-two.

Present:

HON. HENRY J. FRIENDLY

Chief Judge

HON. STERRY R. WATERMAN
HON. PAUL R. HAYS

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LAURENT FIOCCONI and JEAN CLAUDE KELLA,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

VINCENT A. CARLIN
Chief Deputy Clerk